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No. 95-581

In The
Supreme Court of the United States
October Term 1995

Seattle Lake Shore and Eastern Railroad, Inc.,

petitioner,

v.

Interstate Commerce Commission,
United States Of America,

respondent,

Petition For Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER
and
MOTION TO STRIKE BRIEF OF OPPOSITION OF CITY OF SEATTLE, BURLINGTON NORTHERN RAILROAD, AND RAILS TO TRAILS CONSERVANCY

Seattle Lake Shore and Eastern Railroad, Inc.
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MOTION TO STRIKE BRIEF OF OPPOSITION OF CITY OF SEATTLE, BURLINGTON NORTHERN RAILROAD, AND RAILS TO TRAILS CONSERVANCY

1. A Petition for Writ of Certiorari was filed by Petitioner on September 27, 1995 and served upon the Federal Respondents and other parties on September 29, 1995. The response briefs of the **Federal Respondents** and **others** were due on November 9, 1995

2. On November 3, 1995, the **Federal Respondents** requested the Court Clerk to extend their respond time to December 11, 1995. Petitioner did not object to the time extension of the **Federal Respondents**. On November 7, 1995, The U.S. Supreme Court Clerk granted a time extension to December 11, 1995, to the **Federal Respondents**.

3. On December 11, 1995, the Federal Respondents filed their Opposition Brief with the Court. Petitioner received their copies VIA U.S. Mail on December 13, 1995.

4. Also on December 13, 1995, Petitioner received a brief in Opposition from third parties/intervenors City of Seattle, Burlington Northern Railroad, and Rails To Trails Conservancy.

5. Petitioner objects to the Court accepting the third party/intervenor Opposition Brief as it was late filed. The Court Clerk only granted permission for a time extension to the **Federal Respondents**. Petitioner did not object to the time extension for the **Federal Respondents**. Petitioner would have objected to a time extension for a third party/intervenor. The third parties/ intervenors all have numerous attorneys on staff and there can be no excuse for

their late filing, particularly in light that they did not even make a motion to the Court for a time extension, see Supreme Court Rule 30.4.

6. Nothing in the Supreme Court rules allows third parties/intervenors to bootstrap on a respondents motion for a time extension to file briefs. A careful reading of the respondents motion for time extension and the Court clerk's granting of the extension does not include any language even remotely allowing third parties/intervenors a time extension also.

7. Petitioner respectively requests the Court to not allow the Opposition Brief of the third parties/intervenors to be admitted into the record of this Writ of Certiorari, Rule 30.4.

Dated 20th September, 1995,
Respectively submitted,

Daryl A. Deutsch, *Attorney of record*

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REPLY BRIEF OF PETITIONER

Seattle Lake Shore and Eastern Railroad, Inc.
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QUESTIONS PRESENTED FOR REVIEW

1. Did the ICC and the court panel below act contrary to the precedence of *Sharp v. U.S.*, 91 U.S. 341 (1903) in allowing an unaccepted offer to establish fair market value of the abandoned rail properties? U.S. Supreme Court Rule 10.1(c).

2. Did the Interstate Commerce Commission (ICC) abrogate their statutorial responsibility to the National Rail Transportation Policy pursuant to 49 U.S. 10101a, by allowing non-rail use in abandoned rail corridor instead of allowing continued rail use by a qualified carrier?

3. Did the ICC and the lower court not allow the nominal financial assistance offer of petitioner directly against the precedence set in *Iowa Terminal Railroad v. ICC*, 853 F.2d 965 (1988)? U.S. Supreme Court Rule 10.1(a).

4. Did the ICC act inconsistent with 49 U.S.C. 10905(c) and (d) and, arbitrarily and capriciously reject an offer of financial assistance for continued operation of a rail line on grounds that petitioner's nominal offer for financial assistance was invalid because outside, non-rail, third parties made unaccepted offers in excess of petitioner's bid for continued rail service when the third parties unaccepted offers were for recreational use not continued rail use?

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INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA

respondents

Petition For Writ Of Certiorari To The U.S. Court Of Appeals D.C. Circuit

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REPLY BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit in *Seattle Lake Shore and Eastern Railroad. Inc. v. I.C.C.* Docket No. 94-1341 is an unreported per curiam decision dated May 10, 1995, but the decision is noted at 55 F.3d 684 (Table). Also see Pet. App-A1.

JURISDICTION

Jurisdiction is unchanged from Petitioners Writ of Certiorari.

STATEMENT OF THE CASE

The Statement of the Case is unchanged from Petitioners Writ of Certiorari.

ARGUMENT

Petitioner raised four questions in its brief for Writ of Certiorari (Pet. i and 7-17). The Federal Respondents (Resp.) in opposition replies to only Question 3 of Petitioner and tries to dismiss Question 1 in a footnote (Resp. 8 fn 9). Petitioner's Questions 2 and 4 were not addressed by the Federal Respondents.

1. Petitioner would like to bring to the Courts' attention the inadmissible statements made by the Federal Respondents in their Opposition Brief concerning the alleged bid of $600,000 for the line in question (Resp. 6 and 8 fn 8). This alleged offer of $600,000 was never a part of the Interstate Commerce Commission (ICC) record in this proceeding. The decisions below which did not rely on the Seattle $600,000 offer or purchase are not in the record. Items not in the record cannot be used for decision making, *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Petitioner would also like to bring to the Courts' attention the inadmissible statements made by the Federal Respondents in their Opposition Brief concerning the alleged acquisition of the line in question by the City of Seattle for $975,000 (Resp. 8 fn 8). The alleged acquisition is not a part of the record evidence of this proceeding, *see SEC v. Chenery Corp., id.*

In fact, if this Court grants Certiorari and remands the case back to the ICC, it will be conclusively shown that the City of Seattle only acquired a 30 foot trail right of way over the property Petitioner was trying to acquire and had planned to use for railroad purposes. The ICC never allowed Petitioner to present complete evidence that the abandoning railroad did not have marketable title to the right of way, which would have allowed

Petitioner to show the right of way had no value in a 49 U.S.C. 10905 proceeding, *Iowa Terminal R.R. v. ICC*, 853 F.2d 965, 968, D.C. Circuit 1988.

2. The Federal Respondents in their Opposition brief (Resp. 8 fn 9) misstates the correct law of the case in *Sharp v. U.S.*, 191 U.S. 341 (1903) where they say "... merely held inadmissible in condemnation proceedings a property owner's uncorroborated testimony regarding alleged oral and non-binding offers to purchase real estate." *Sharp* speaks to the premise of unacceptable offers not un-binding offers. *Sharp* is not limited to oral offers. *Sharp* has been cited for rejection of written offers, *see Missouri Baptist Hospital v. U.S.*, 555 F.2d 290, 298, (Court of Claims 1977). If the ICC had abided by the law of *Sharp*, then we would not be before this Court asking for Certiorari.

But the ICC did just the opposite of the *Sharp* holding when the ICC did in fact accept the written, casual, unaccepted and highly restricted offer of $175,000; an unaccepted offer that expired unused and an offer that had no consideration attached and an offer that was highly restrictive with contingencies for a showing of no serious environmental damage (Pet. App. C-4). The Federal Respondents in their opposition brief (Resp. 8) say the $175,000 was "firm" when in reality the offer was highly restrictive. A firm offer would have a showing of a consideration or of earnest money; neither of which were present in the instant case. The D.C. Circuit in their one paragraph, unpublished decision reiterated that the $175,000 offer was the basis for their decision (Pet. App. A-1).

Also, the ICC argued to the D.C. Circuit that the ICC did not act as a condemnation agent in 49 U.S.C. 10905 proceedings. Now the ICC (U.S.) does not argue that issue, *Chicago North Western Transp. Co. v. U.S.*, 678 F.2d 665, 668 (7th Circuit 1982). It is obvious that the ICC is the condemnation agent and subject to *Sharp*.

The Federal Respondents try to say (Resp. 8) that *Chicago North Western Transp., supra*, and *Portland Traction Co--Abandonment Exemption--In Multnomah & Clackamas Counties, OR*, ICC Docket No. AB-225 (Sub. No. 2X) (ICC served Jan. 10, 1990) are on point with *Sharp* when in fact both cases are clearly distinguishable from *Sharp*. *Chicago North Western* does not even talk about "ICC must consider all written offers..." as the Federal Respondent brief implies. *Portland Traction* is distinguishable from *Sharp* because it involved a signed contract to purchase, not a mere unaccepted offer.

The ICC must have had a change of heart on the unaccepted offer issue because on September 15, 1995, just days before Petitioner's Petition For Writ Of Certiorari was due to this Court, the ICC decided *Wyoming & C.R.R.--Abandonment Exemption--Jackson County, Co.*, ICC Docket No. 307 (Sub. No. 2X) where the ICC took the exact opposite approach to a written, unacceptable, un-binding, no consideration offer for an abandoned railroad right of way. In that case, the ICC said they could not accept an unacceptable offer (Pet. App. G-1). If the ICC had said the same thing in Petitioner's case, we would not be here today before this Court.

CONCLUSION

Petitioner respectfully requests this Court to accept the Petition for Writ Of Certiorari for the reasons stated below:

1. The ICC decision is contrary to long standing U.S. Supreme Court precedence in *Sharp v. U.S.*, supra, when the ICC allowed an unaccepted offer to set value for 49 U.S.C. 10905 net liquidation purposes. U.S. Supreme Court Rule 10.1(c).

2. The decision of the lower court and the ICC is contrary to Congressional intent and jeopardizes the future of the National Rail Transportation Policy as defined in 49 U.S.C. 10101a.

3. The ICC acted inconsistent with *Iowa Terminal*, supra, when they disallowed petitioner's nominal offer of financial assistance in a 49 U.S.C. 10905 proceeding. U.S. Supreme Court Rule 10.1(a).

4. The ICC actions were arbitrary and capricious when the ICC allowed an unsupported and unaccepted offer to set the net liquidation value and summarily dismissed petitioner and petitioner's offer as *bona fide* without allowing petitioner a chance to prove its nominal offer was valid. Also, the ICC went against its own past precedence and assigned value to an ambiguous land title deed and allowed a third party to make an offer without a showing of the party's *bona fides*..

Dated this 20th Day of December, 1995

Respectfully submitted,

Daryl Deutsch, *attorney of record*